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# In the Supreme Court of the United States

OCTOBER TERM, 1962

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No. 424

I. A. WATSON, JR., ET AL., PETITIONERS

*v.*

CITY OF MEMPHIS, ET AL.

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*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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### OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit (R. 111–122) is reported at 303 F. 2d 863. The opinion of the United States District Court for the Western District of Tennessee (R. 105–110) is not reported.

### JURISDICTION

The judgment of the court of appeals was entered on June 12, 1962 (R. 110). The petition for a writ of certiorari was granted by this Court on November 19, 1962 (371 U.S. 909; R. 123). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether the enforcement of Negroes' constitutional right to non-discriminatory access to public recreational facilities may be delayed where the public authorities have failed to meet their burden of establishing that serious physical obstacles and other unique problems stand in the way of immediate desegregation.

## INTEREST OF THE UNITED STATES

This case marks the first time that the Court has had before it on the merits the issue of whether the decision of this Court to allow public primary and secondary schools to be desegregated "with all deliberate speed" (*Brown* v. *Board of Education*, 349 U.S. 294), rather than forthwith, has become the general rule (and not an extremely limited exception) with respect to the desegregation of public facilities—here, public recreational facilities. The government participated as *amicus curiae* in the cases which led to the formulation of the *Brown* decree and supported the view that, under general doctrines of equity, some delay in the enjoyment of the right to attend non-segregated public schools was not impermissible. Problems peculiar to school segregation were cited in the government's briefs as warranting a departure from the general rule that constitutional rights are *present* rights. As the second *Brown* opinion shows, the Court adopted this reasoning. The question whether similar considerations are applicable in cases involving the right of equal access to

public recreational facilities is an issue of national importance.

## STATEMENT

This action was brought by adult Negro citizens of the United States and the State of Tennessee, residing in the City of Memphis, Tennessee, on behalf of themselves and others similarly situated, to desegregate the public recreational facilities in that city. Filed on May 13, 1960, the action was in the form of a complaint for declaratory and injunctive relief, invoking jurisdiction under 28 U.S.C. 1343, 2201, 2202 and 42 U.S.C. 1981, 1983.

The plaintiffs alleged that certain public libraries, parks, playgrounds, golf courses, boat docks, and lakes are restricted to the exclusive use of either whites or Negroes[1] and that public art galleries and museums restrict their admission of Negroes to one day per week, whites being exclusively admitted on all of the other days (R. 6).

The answer of the defendants was filed on July 1, 1960. It did not deny the existence of racial segregation in public recreational facilities in Memphis, asserting in this respect only that "[i]n other than residential areas, the parks are used generally by all the citizens of Memphis" (R. 9). The defendants also alleged that the facilities made available to Negroes were adequate in proportion to their numbers; that "historically and traditionally, riots and violence have frequently occurred in areas where races

[1] It was also claimed that the "white" facilities "far outnumber" those which are restricted to Negroes (R. 6).

are mixed in large numbers in places of amusement" (R. 11); that the geographical location of the city engendered peculiar problems; and that "the incidence of violence, vandalism and disorders among visitors to the parks of the City of Memphis is greatly increased in those parks frequented by Negro citizens" (R. 12). The answer pointed to the possible loss of revenues from concessions and the prohibitive cost of additional police protection as reasons for not desegregating and cited specific problems relating to racially restrictive covenants affecting the title to certain parks (R. 11, 12).

At the trial, held on June 14–15, 1961, it was shown that the recreational program of the City of Memphis serves 100,000 children, approximately 65 percent of whom are white and 35 percent Negro. Of the 131 parks owned by the city, 58 are white-only, 25 Negro-only, 25 are desegregated, and 23 undeveloped (R. 39, 92).[2]

Negro witnesses testified to instances where they were turned away from playgrounds (R. 26) and golf courses (R. 13, 16, 24) located more conveniently to their homes than available Negro facilities. Other witnesses experienced racial exclusion or discrimination when they tried to use the Fairgrounds amusement park (R. 18), the Pink Palace art museum (R. 18), certain tennis courts (R. 27, 30), and when they tried to enter a fishing rodeo (R. 20).

The chairman of the park commission (R. 32–61), the superintendent of the park system (R. 62–86) and

[2] The zoo, an art gallery and a boat dock at McKellar Lake are desegregated (R. 40).

the chief of police (R. 87–90) testified that, in their opinion, violence and disorder would result if all of the public recreational facilities in Memphis should desegregate at once (R. 54, 88) and that a curtailment of the program for the Negro children might occur (R. 71). The Commission chairman stated, however, that no violence had occurred at those facilities already desegregated (R. 53). The superintendent related that police protection had been increased at the zoo since it was desegregated (R. 72), but the only specific instance of disorder in the parks that he cited occurred at one of the closing exercises for Negroes at Lincoln Park, a problem admittedly not connected with desegregation (R. 83). The chief of police apparently based his opinion that violence and disorders might occur upon his experience with the desegregated bus system. The police, he said, "had many calls on the trouble we have had on the buses since they have been integrated" (R. 87). He also cited one specific instance of racial trouble in connection with a "sit-in" at a drug store (R. 90).

On June 20, 1961, the district court entered its judgment denying the injunction (R. 103).[3] It

[3] The district court found that Memphis has 117 playgrounds, 12 community centers, and ten swimming pools. Of the 117 playgrounds, 61 are on city-owned property controlled by the park commission. Of these, 40 were restricted to whites and 21 to Negroes. The other 56 playgrounds and facilities operated by the park commission are on property owned by churches, private groups and the school board. Of these, 30 are restricted to whites and 26 to Negroes. The 12 community centers with gymnasiums are all on city-owned property; eight

approved the plan of the defendants for desegregating the Fairgrounds by the end of 1961 and for desegregating the golf courses in stages, the last stage occurring on January 1, 1964 (R. 102–104). The court retained jurisdiction of the cause, staying its adjudication of the controversy concerning the Pink Palace art museum to allow the state courts time to pass on the racial covenant, and ordered the defendants to submit within six months from June 15, 1961, a plan for the desegregation of the playgrounds and community centers (R. 96). The court held that "[n]o specific terminal date for such integration can be set at this time" (R. 96).

The plaintiffs appealed, and on June 12, 1962, the court of appeals affirmed (R. 110).

## SUMMARY OF ARGUMENT

The courts below justified postponement of the enforcement of petitioners' right to equal access to public recreational facilities by reference to *Brown* v. *Board of Education*, 349 U.S. 294, where the Court directed that public primary and secondary schools be desegregated "with all deliberate speed." In the context of public recreational facilities and on the record in this case, we submit that the courts below erred in permitting delay.

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of these were restricted to whites and four to Negroes. Of the ten swimming pools, five were restricted to whites and five to Negroes. At the time of the district court decision, restrictions as to use by Negroes were scheduled to be removed "in the near future" at one of the white-only community centers and at one of the white-only pools (R. 92–93).

I.

When the Court had the school segregation cases before it, the principle was already well established that the constitutional right of Negroes to be free from discrimination on account of their race is a present and immediately enforceable right. However, both the Court and the parties to the *Brown* case recognized that public primary and secondary school desegregation posed such serious physical obstacles and other unique problems that some reasonable delay might be appropriate. In conformity with this conclusion, the Court ordered the schools desegregated "with all deliberate speed."

In thus sanctioning a measure of delay in public school desegregation, the Court was not abandoning the principle that constitutional rights are presently enforceable or engrafting a "with all deliberate speed" exception as a permanent and routine feature in the enforcement of Fourteenth Amendment rights. It simply held that, in the face of obstacles as formidable as those facing the public school systems, it was within the appropriate discretion of a court of equity to permit a reasonable amount of delay in desegregation. The Court emphasized that in each case the burden was upon the public officials to justify any such delay.

II.

There is nothing about public recreational facilities to suggest that their desegregation would present insuperable problems. None of the difficulties identified by the Court in its *Brown* opinion is present in

any significant degree. The only major area of similarity between the public school and recreational facility situations is the fact that both involve large numbers of people. However, this factor has far more significance in the educational field because of closer supervision, more constant and regular attendance, and its compulsory character. Thus, since no problems fairly comparable to those involved in public school desegregation are readily apparent in the case of desegregation in public recreational facilities, the burden upon public officials to justify any delay in the latter instance is extremely heavy.

III.

In this instance, the public authorities failed to make any case at all for the proposition that delay was warranted by serious obstacles standing in the way of desegregating the City's recreational facilities. This is demonstrated by an analysis of the factors cited by the district court. A number of them depended upon assumptions of potential violence and increased need for police protection, which were without any concrete support in the record. Others were based on such untenable concepts as that "separate but equal" facilities were adequate for the petitioners and that popular hostility to desegregation would justify delay. Still other factors, such as the fact that good will and understanding prevails between the races, argued more for prompt desegregation than for delay. In short, the public authorities failed entirely to meet their burden of establishing that serious

physical obstacles and other unique problems stand in the way of immediate desegregation.

## ARGUMENT

The courts below have ordered that the vindication of the petitioners' unquestionable right, under the Fourteenth Amendment, to the abolition of racial discrimination in the public recreational facilities of Memphis may be postponed under a plan for gradual desegregation. They justify this conclusion by reference to this Court's decision in *Brown* v. *Board of Education,* 349 U.S. 294, where the Court directed that public primary and secondary schools be desegregated, not immediately, but "with all deliberate speed" (349 U.S. at 301).

It is the position of the government, as *amicus curiae, First,* that the right to equal protection of the laws is a present and immediately enforceable right and that the Court in the *Brown* case was willing to sanction a measure of delay only because of the formidable physical obstacles and other unusual problems that would be encountered in the complete integration of large and complex public school systems; *Second,* that, since no fairly comparable problems are readily apparent in the case of desegregation in public recreational facilities, the burden upon public authorities to justify any delay is an extremely heavy one; and *Third,* that the public authorities in this case have established no necessity whatever for any delay in the desegregation of the public recreational facilities of Memphis.

I. THE RULE THAT CONSTITUTIONAL RIGHTS ARE PRESENTLY ENFORCEABLE IS SUBJECT TO EXCEPTION ONLY IN THE MOST UNUSUAL AND EXIGENT CIRCUMSTANCES

By the time this Court had before it the cases involving segregation in primary and secondary schools, it had become well established that the constitutional right of Negroes to be free from discrimination on account of their race is a present right, entitled to immediate enforcement. Thus, in *Sipuel* v. *Board of Regents*, 332 U.S. 631, 633, the Court (citing *Missouri ex rel. Gaines* v. *Canada*, 305 U.S. 337) declared that a State must provide Negroes with a legal education in state institutions in conformity with the equal protection clause and that it must do so "as soon as it does for applicants of any other group." In *Sweatt* v. *Painter*, 339 U.S. 629, the Court ordered the admission of a Negro to the University of Texas Law School; quoting the *Sipuel* case, *supra*, it said, "It is fundamental that these cases concern rights which are personal and present" (339 U.S. at 635).[1]

Similarly, in *McLaurin* v. *Oklahoma State Regents*, 339 U.S. 637, the Court struck down restrictions on full and non-discriminatory attendance by a Negro at

[1] The idea that the constitutional right to equal protection of the laws is a "personal" right as well as a "present" one was developed in response to arguments pointing to the limited number of persons who might have been actively demanding their enjoyment. As the Court said in *Missouri ex rel. Gaines* v. *Canada*, *supra*, "petitioner's right was a personal one. It was as an individual that he was entitled to the equal protection of the laws and the State was bound to furnish him within its borders facilities for legal education * * * whether or not other negroes sought the same opportunity." 305 U.S. at 351.

the graduate school of the University of Oklahoma, saying (339 U.S. at 642):

> We conclude that the conditions under which this appellant is required to receive his education deprive him of his personal and present right to the equal protection of the laws [citing *Sweatt* v. *Painter*, *supra*].

That the concept of the present enforceability of the right to equal protection had become firmly ingrained in our constitutional jurisprudence by the early 1950's is further demonstrated by the fact that there had been no thought or suggestion of delay in the enforcement of the rights involved when this Court ended racial discrimination in such areas as voting,[7] interstate travel,[8] property ownership,[9] restaurants in the District of Columbia,[10] employment,[11] and jury service.[12]

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[7] *Smith* v. *Allwright*, 321 U.S. 649; *Schnell* v. *Davis*, 336 U.S. 933; *Terry* v. *Adams*, 345 U.S. 461; *Lane* v. *Wilson*, 307 U.S. 268; *Rice* v. *Elmore*, 165 F. 2d 387 (C.A. 4), certiorari denied, 333 U.S. 875.

[8] *Henderson* v. *United States*, 339 U.S. 816 (1950); *Morgan* v. *Virginia*, 328 U.S. 373; *Bob-Lo Excursion Co.* v. *Michigan*, 333 U.S. 28.

[9] *Shelley* v. *Kraemer*, 334 U.S. 1; *Hurd* v. *Hodge*, 334 U.S. 24; *Buchanan* v. *Warley*, 245 U.S. 60; *Harman* v. *Tyler*, 273 U.S. 668; *City of Richmond* v. *Deans*, 281 U.S. 704; *Barrows* v. *Jackson*, 346 U.S. 249; *Oyama* v. *California*, 332 U.S. 633.

[10] *District of Columbia* v. *John R. Thompson Co., Inc.*, 346 U.S. 100.

[11] *Railway Mail Assn.* v. *Corsi*, 326 U.S. 88; *Yick Wo* v. *Hopkins*, 118 U.S. 356; *Takahashi* v. *Fish and Game Comm.*, 334 U.S. 410; *Graham* v. *Brotherhood of Locomotive Firemen & Enginemen*, 338 U.S. 232; *Brotherhood of Railroad Trainmen* v. *Howard*, 343 U.S. 768.

[12] *Ex parte Virginia*, 100 U.S. 339; *Virginia* v. *Rives*, 100 U.S. 313; *Hill* v. *Texas*, 316 U.S. 400; *Cassell* v. *Texas*, 339 U.S. 282; *Avery* v. *Georgia*, 345 U.S. 559.

The primary and secondary school cases, however, presented situations of an altogether different order. No evidentiary showing was necessary to make it clear that in those cases the Court would be confronted with unique and complex physical problems far greater in magnitude than those experienced in any of the prior racial discrimination cases. Thus, in its first opinion in *Brown* v. *Board of Education*, 347 U.S. 483, the Court noted that because the cases involved were class actions, "because of the wide applicability of this decision, and because of the great variety of local decisions, the formulation of decrees in these cases presents problems of considerable complexity" (347 U.S. at 495); accordingly, the Court took the unusual step of postponing its decision on the relief to be granted until after further argument on certain specified questions, notably: "[M]ay this Court, in the exercise of its equity powers, permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinctions?" (347 U.S. at 496, n. 13).[11]

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[11] The full text of the questions (which had been among a number of questions previously propounded at 345 U.S. 972–973) was:

> 4. Assuming it is decided that segregation in public schools violates the Fourteenth Amendment
>
> (*a*) would a decree necessarily follow providing that, within the limits set by normal geographic school districting, Negro children should forthwith be admitted to schools of their choice, or
>
> (*b*) may this Court, in the exercise of its equity powers, permit an effective gradual adjustment to be

The briefs filed by the various parties in response to this question suggested, in varying degrees, that the peculiar problems presented by the desegregation of public primary and secondary schools might well warrant some delay in the enforcement of the Court's decision on the merits. The factors put forward by the parties as indicating the appropriateness of a departure from the ordinary rule that constitutional rights are presently enforceable included: [12]

1. The possibility that extensive revision of school district boundaries and consolidation of schools might become necessary;

2. Problems of transfer of teachers and pupils; revision of teaching schedules; and alteration of transportation arrangements; elimination of duplication of functions arising from

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brought about from existing segregated systems to a system not based on color distinctions?

5. On the assumption on which questions 4 (*a*) and (*b*) are based, and assuming further that this Court will exercise its equity powers to the end described in question 4(*b*),

(*a*) should this Court formulate detailed decrees in these cases;

(*b*) if so, what specific issues should the decrees reach;

(*c*) should this Court appoint a special master to hear evidence with a view to recommending specific terms for such decrees;

(*d*) should this Court remand to the courts of first instance with directions to frame decrees in these cases, and, if so what general directions should the decrees of this Court include and what procedures should the courts of first instance follow in arriving at the specific terms of more detailed decrees?

[12] While this listing is necessarily somewhat generalized, we believe it to be a fair summary of what was developed at length in the various briefs submitted in the *Brown* case.

the existence of separate sets of supervisory and administrative officials for Negro and white schools;

3. Necessity of changes in the law where allocation of school funds depends by statute upon the relative number of Negro and white children of school age;

4. The added burden of accomplishing these difficult administrative tasks in an environment of potential hostility generated by long-standing community acceptance of segregation as a "way of life";

5. The vast number of persons involved;

6. The great variation in the type of racial situation to be encountered in different communities.

7. The psychological adjustments necessary where great numbers of persons of different racial backgrounds would be brought into close contact.

In announcing its decree, *Brown* v. *Board of Education*, 349 U.S. 294, the Court accepted the view that, because the implementation of its decision on the merits might "call for the elimination of a variety of obstacles in making the transition to [desegregated] school systems" (349 U.S. at 300), some reasonable delay in the enforcement of the rights involved could be justified. The Court gave meaning to this conclusion by setting forth some of the considerations that it had in mind (349 U.S. at 300–301):

> problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas

> into compact units to achieve a system of determining admission to the public schools on a non-racial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems.

On the other hand, it expressly rejected some of the factors that had been advanced by the parties; thus, it emphasized that "the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them" (349 U.S. at 300).

In light of those difficult problems, the Court sanctioned a measure of delay by ruling that an end to public school segregation should be accomplished "with all deliberate speed."[13] It is apparent not only from the unusual procedure employed by the Court in those cases, but from the face of its opinion as well, that the Court was willing to accept this departure from the settled principle of present enforceability only

[13] The brief filed on behalf of the County School Board of Prince Edward County seems to have been the first to suggest the "with all deliberate speed" concept, by citing language by Mr. Justice Holmes in *Virginia* v. *West Virginia*, 222 U.S. 17, 19–20. Mr. Justice Holmes there said, "But a state cannot be expected to move with the celerity of a private businessman; it is enough if it proceeds, in the language of the English Chancery, with all deliberate speed." The United States Commission on Civil Rights in its 1959 Report, p. 157, n. 52, disclosed that a student legal research group of the University of Virginia had, on its behalf, researched the English Chancery cases from 1220 to 1865 and had found nothing closer to the language quoted than "with all convenient speed" and "as soon as conveniently might be." Similar research was apparently also done by Mr. Jack Greenberg, who reported in *Race Relations and American Law*, p. 216, that he and others who researched the English precedents "extensively" had found "nothing to elucidate the term's meaning."

because of the truly exceptional character of the physical problems involved in the cases before it. And even though the magnitude of those problems was obvious, the Court emphasized that in each case "[t]he burden rests upon the defendants to establish that [additional] time is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date" (349 U.S. at 300).

It is thus abundantly clear that the Court, in permitting some delay in the desegregation of public primary and secondary schools, did not mean to abandon the principle that constitutional rights are entitled to present enforcement, or to engraft a "with all deliberate speed" exception upon the law as a permanent and routine feature in the enforcement of Fourteenth Amendment rights. That this is so is further demonstrated by the fact that in a number of subsequent cases the Court has summarily rejected attempts to postpone the enjoyment of the right to equal protection. Thus, in the field of higher education, the Court in *Florida ex rel. Hawkins* v. *Board of Control*, 350 U.S. 413, remanded the case on the authority of its decision in the *Brown* case, stating that "[a]s this case involves the admission of a Negro to a graduate professional school, there is no reason for delay. He is entitled to prompt admission under the rules and regulations applicable to other qualified candidates." See also *Lucy* v. *Adams*, 350 U.S. 1; *Booker* v. *Tennessee Board of Education*, 240 F. 2d 689 (C.A. 6), certiorari denied, 353 U.S. 965. The same is true in the field of transportation facilities. See

*Boynton* v. *Virginia*, 364 U.S. 454; *Browder* v. *Gayle*, 142 F. Supp. 707 (M.D. Ala.), affirmed, 352 U.S. 903; *Flemming* v. *South Carolina Electric & Gas Co.*, 224 F. 2d 752 (C.A. 4), appeal dismissed, 351 U.S. 901, and 239 F. 2d 277 (C.A. 4).

In sum, we submit that the teaching of the *Brown* case, considered in light of what had gone before and what has happened since, is that the right to equal protection of the laws, like other constitutional rights,[14] is immediately enforceable; that it is only in the face of the most formidable obstacles that any exception may be made to that principle; and that any public authorities seeking to justify such an exception must carry a very heavy burden of proof.

We are thus brought to the central question of this case: whether the desegregation of public recreational facilities—either intrinsically or as explained in the record below—is likely to involve physical problems or other unique considerations so insuperable as to bring it within that narrow exception.

## II. THERE IS NOTHING IN THE NATURE OF PUBLIC RECREATIONAL FACILITIES TO SUGGEST ANY NECESSITY FOR DELAY IN THEIR DESEGREGATION

Unlike the situation in public primary and secondary schools, there is nothing about the essential character of public recreational facilities to suggest that

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[14] As the Court of Appeals for the Fifth Circuit stated recently in a school desegregation case (*Ross* v. *Dyer*, No. 11921, decided December 28, 1962, slip opin., p. 8):

> Ordinarily, on a declaration by a court of unconstitutional deprivation of rights, the relief granted is immediate and complete.

desegregation would present insuperable physical problems. None of the administrative difficulties identified by the Court in its implementation opinion in the *Brown* case (see pp. 14–15, supra) has significant application here. Thus, the problems of overcrowded classrooms and inadequate educational equipment implicit in this Court's concern over "the physical condition of the school plant" (349 U.S. at 300) have no real counterpart in such flexible facilities as public parks, playgrounds and museums. There is obviously no accessory "transportation system" (*ibid.*) problem in relation to such facilities. Whatever minor problems of "personnel" (*ibid.*) may be posed by the desegregation of recreational facilities are insignificant compared with the profound difficulties attending such a process in the closely-supervised, highly personalized school situation. The "revision of * * * districts and attendance areas" (*ibid.*) required by school desegregation finds no equivalent whatever in most systems of public parks and other recreational facilities. Finally, while the necessity for "revision of local laws and regulations" (349 U.S. at 301) raises serious problems in relation to a governmental function subject to as detailed and comprehensive regulation as schools, such is plainly not the case in the recreational field.

The only major area of similarity between the process of public school desegregation and that of public recreational facilities is that in both instances relatively large numbers of people may be involved (see p. 14, *supra*). We submit, however, that the

similarity is more apparent than real. In the first place, sheer numbers create a significantly greater administrative problem in education because of the far higher degree of supervision and because physical facilities and equipment must more closely match the number of children involved. Second, recreational facilities will normally be attended with far less frequency and regularity, on an individual basis, than educational facilities. This circumstance stems in large part from a third and extremely important difference: the compulsory character of school attendance, contrasted with the purely voluntary use of recreational facilities. This point was emphasized by the court of appeals in *Dawson* v. *Mayor and City Council of Baltimore*, 220 F. 2d 386 (C.A. 4), affirmed, 350 U.S. 877, when it said (220 F. 2d at 387):

> * * * if [a State's police] power cannot be invoked to sustain racial segregation in the schools, where attendance is compulsory and racial friction may be apprehended from the enforced commingling of the races, it cannot be sustained with respect to public beach and bathhouse facilities, the use of which is entirely optional.

Considering that there is thus nothing in the nature of recreational facility desegregation to suggest really serious physical obstacles, it is not surprising that, in almost all cases involving the desegregation of such facilities, the possibility of delay was not even considered. See, *e.g.*, *Dawson* v. *Mayor and City Council of Baltimore*, *supra* (beaches and bathhouses); *New Orleans City Park Improvement Ass'n*

v. *Detiege*, 252 F. 2d 122 (C.A. 5), affirmed, 358 U.S. 54 (golf courses and other facilities of City Park); *Holmes* v. *City of Atlanta*, 124 F. Supp. 290 (N.D. Ga.), affirmed, 223 F. 2d 93 (C.A. 5), vacated, 350 U.S. 879 (golf courses); *Tate* v. *Department of Conservation*, 133 F. Supp. 53 (E.D. Va.), affirmed, 231 F. 2d 615 (C.A. 4), certiorari denied, 352 U.S. 838 (state parks); *Moorhead* v. *City of Ft. Lauderdale*, 152 F. Supp. 131 (S.D. Fla.), affirmed, 248 F. 2d 544 (C.A. 5) (golf course); *Simkins* v. *City of Greensboro*, 149 F. Supp. 562 (M.D.N.C.), affirmed, 246 F. 2d 425 (C.A. 4) (golf course); *City of St. Petersburg* v. *Alsup*, 238 F. 2d 830 (C.A. 5) (beach and swimming pool); *Shuttlesworth* v. *Gaylord*, 202 F. Supp. 59 (N.D. Ala.) (public recreational facilities of the City of Birmingham and businesses operated in connection therewith); *Holley* v. *City of Portsmouth*, 150 F. Supp. 6 (E.D. Va.) (golf courses, swimming pools, bathing beaches, parks, etc.);[15] *Willie* v. *Harris County*, 202 F. Supp. 549 (S.D. Texas) (Silvan Beach Park); *Ward* v. *City of Miami*, 151 F. Supp. 593 (S.D. Fla.) (golf course).[16]

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[15] Although only the municipal golf course was in issue in this case, in its opinion the court said that "the separate but equal doctrine has ceased to exist with respect to governmental facilities including golf courses, swimming pools, bathing beaches, parks, etc." (150 F. Supp. at 7).

[16] In *City of Montgomery* v. *Gilmore*, 277 F. 2d 364 (C.A. 5), the court of appeals indicated that, where it indisputably appeared that ordering immediate desegregation of the park facilities of a large city would result in all citizens' being totally and indefinitely deprived of any recreational facilities whatever, some reasonable measure of delay might be appropriate. In *Cummings* v. *City of Charleston*, 288 F. 2d 817 (C.A. 4),

One other point deserves mention. The Court, in determining the character of the relief to be granted in the *Brown* case, was obliged to take into account the fact that its decision on the merits effected a substantial change in what had theretofore been widely supposed to be the law of the land. As of the early 1950's, public authorities could not fairly be said to have been on authoritative notice that public school segregation was unconstitutional and that detailed plans for eventual desegregation should therefore be laid. In view of the magnitude and complexity of the problems of public school administration, this circumstance alone lent considerable justification to a reasonable delay in the enforcement of the Court's decree. No such element is present in the case of public recreational facility desegregation in the early 1960's. It was decided by this Court in 1955 that segregation of the races in such facilities violates the equal protection clause of the Fourteenth Amendment. *Dawson* v. *Mayor and City Council of Baltimore*, 220 F. 2d 386 (C.A. 4), affirmed, 350 U.S. 877; see also *Muir* v. *Louisville Park Theatrical Ass'n*, 347 U.S. 971. Any need for time to adjust to that decision has long since been exhausted; public authorities have already had over seven years in which to

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the court indicated that "if justifying circumstances were made to appear" a trial court might have discretion to order a delay; however, no delay (beyond that agreed to by the parties) was there ordered. In *Hayes* v. *Crutcher*, 137 F. Supp. 853 (M.D. Tenn.), and *Augustus* v. *Pensacola*, 1 Race Rel. L. Rep. 681 (N.D. Fla.), the court allowed only such reasonable time as was essential for the defendants to make necessary arrangements to comply with its decree.

work out any problems posed by the desegregation of public recreational facilities.

Although the magnitude of the physical obstacles to public school desegregation—as they existed in 1954–55, at least—was obvious on the face of the matter (see, *e.g.*, *Brown* v. *Board of Education*, 345 U.S. 972, 973; 347 U.S. 483, 495), this Court was at pains to emphasize that public authorities nevertheless had the burden of establishing the actual necessity of delay in the vindication of recognized constitutional rights (349 U.S. 294, 300). If such a burden is imposed where the existence of extraordinary problems is obvious, it is, we submit, fairly inferable that a much higher burden is to be imposed where the existence of such serious problems is not readily apparent. We have shown that there is nothing in the essential nature of public recreational facilities or systems to suggest that their desegregation will present any great difficulties—not, at any rate, at this late date. It follows, we believe, that delay in such a process can be justified in a particular case only under the most exigent circumstances and upon the clearest and most convincing demonstration that the public authorities face well nigh insuperable problems.

We turn now to the question of whether such a showing was made in this case.

### III. THE RESPONDENTS ADVANCED NO JUSTIFICATION FOR DELAY IN THE DESEGREGATION OF THE RECREATIONAL FACILITIES OF MEMPHIS

Although respondents offered the testimony of several municipal officials (the chairman of the park

commission, the director of the park system and the chief of police), none of them made a convincing case for the proposition that such serious obstacles stood in the way of desegregating the City's recreational facilities as would warrant delay. The lack of justification is apparent from an analysis of the factors considered by the courts below—which in turn reflected the record developed by the public authorities—in ordering the delay. The district court summarized eight such factors (R. 95),[17] each of which is briefly discussed below.

(1) *Importance of time to accomplish change-over from a partially segregated system to an integrated one.*

This factor is, of course, a mere conclusion the validity of which depends upon the adequacy of the sum of the other factors. It does, however, point up one circumstance that, if anything, militates against delay in integration: the Memphis recreational system has already been partially desegregated. Granting petitioners their rights would not require an overnight transformation from total segregation to total integration. The officials administering the system and the general public have already had some experience in adapting themselves to the change.

(2) *Good will and understanding heretofore obtaining between the races.*

Here again, it is difficult to see why this factor does not argue for prompt action rather than delay. If

[17] The district court later restated them in slightly altered form (R. 99), and this restatement was quoted in full by the court of appeals (R. 121).

there is good will and understanding among all groups of Memphis citizens, it would seem that immediate desegregation could be effected more smoothly than if there were hostility. Not that hostility between the races would justify any delay, for the Court made it clear in the *Brown* case that the constitutional principles involved here "cannot be allowed to yield simply because of disagreement with them" (349 U.S. at 300). It is relevant, too, to observe that delay may well do more harm than good to the "good will and understanding" of the community. One writer, commenting on the experience of the Board of Recreation of the District of Columbia (Indritz, *Racial Ramparts in the Nation's Capital*, 41 Geo. L.J. 297, 327), had this to say:

> The net result of the Board's actions * * * has been to impede rather than to help integration through voluntary inter-racial association and the growth of mutual understanding, to lower the quality of public recreation to all, and, most significantly, to invite community crises and warfare in mixed neighborhoods by continuing to exclude colored children from their neighborhood playgrounds while militant groups on both sides lined up for conflict.

Where a feeling of community good will and understanding prevails, delay can serve no purpose but to invite agitators to undermine and dissipate it.

(3) *The fact that, pending the transition period now in progress, ample recreational facilities, under the operation of the Park Commission, will be available to all Negro citizens of Memphis, and no Negro*

*will be denied the right to avail himself of those facilities.*

This factor does not, of course, state any *reason* for delay; it merely argues that delay will not seriously affect the rights of Negroes to avail themselves of recreational facilities. Furthermore, the essence of this consideration is that "separate but equal" (assuming "ample" connotes equality) recreational facilities are available to the Negro citizens of Memphis. We submit that such a factor is entitled to no weight whatever, now that *Plessy* v. *Ferguson*, 163 U.S. 537, has been laid to rest.

(4) *Maintenance of law and order.*

The short answer to this point was given by this Court in *Cooper* v. *Aaron*, 358 U.S. 1, 16, when it said that "law and order are not * * * to be preserved by depriving the Negro children of their constitutional rights." See also *Buchanan* v. *Warley*, 245 U.S. 60, 81. Furthermore, while respondents' witnesses expressed the opinion that, if the recreational system were integrated all at once, it would be necessary to increase police protection (*e.g.*, R. 72), no concrete substantiation was offered for this speculation. On the contrary, it was testified that those facilities that had already been desegregated had not experienced violence (R. 53); indeed, the only incident of violence at a recreational facility cited by any of the witnesses occurred at a segregated (*i.e.*, Negro only) exercise (R. 83; see also R. 81, where it was said that there is more rowdy behavior at Negro parks than at white parks). Moreover, there

was no concrete evidence that the park police force, with the aid of the large (725-man) city police force (R. 88), could not adjust to any increased need for protection that might eventuate.

(5) *Avoidance of confusion and turmoil in the community.*

Here, too, little in the way of actual experience was offered to support the witnesses' expressed fears that confusion and turmoil would reign in the community if all of the recreational facilities were promptly desegregated; in fact, the only specific evidence of general community reaction to recreational desegregation that was advanced was one witness's testimony that he received "a large number of anonymous letters and telephone calls to my home from white people" every time a recreational facility was desegregated (R. 53). However, the same witness testified that the City had "been singularly blessed by the absence of turmoil up to this time on this race question" (R. 43), notwithstanding the fact that a significant number of recreational and other public facilities in Memphis had been desegregated for quite some time, In any event, as we have pointed out (see p. 15, *supra*), community opposition to the enforcement of constitutional rights cannot be permitted to impede their vindication.

(6) *Revenues available from concessions operated on park property.*

Surely such a potential financial loss to the park commission—and such a loss is conjectural in the extreme—cannot justify the withholding of peti-

tioners' constitutional rights. Moreover, this point would now seem to be moot, since the only facility that appears to be affected by this factor, the Fairgrounds amusement park (see R. 42, 65), has already been desegregated in accordance with the court's order (R. 94–95, 114).

(7) *The fact that immediate integration would result in a denial to a substantial number of citizens, both Negro and White, of an opportunity to avail themselves of recreational facilities now afforded to all citizens of Memphis.*

It should be noted that the primary implication of this statement—that some of the facilities will have to be closed in the event of immediate integration—does not stem from any mandate of state law; Tennessee law permits, but does not require, racial segregation in local park facilities (Tenn. Code Ann., Tit. 62, Sec. 715), so that no legislative action would be necessary in order to accomplish complete desegregation. This suggestion that facilities may have to be closed appears to be based upon the testimony of the chairman of the park commission that, in the event of immediate and total desegregation, "We would have to, under the present budget, reduce the number of playgrounds drastically in order to give them full protection" (R. 73). No factual support for this statement was tendered. It was based on an assumption—that integrated facilities require greater police protection than segregated—which in turn had no factual support (see pp. 25–26, *supra*). However that may be, there was no indication of anything

magic about "the present budget" such that, either by internal adjustment within the City's appropriation for recreation or the enlargement of that appropriation, the resources of the City of Memphis were unequal to the task of prompt desegregation of park facilities.

(8) *The constitutional and other legal rights of all citizens, both White and Colored.*

It is not clear just what the district court has reference to in setting forth this factor. Certainly no constitutional or legal right of the Negro citizens is being advanced by a delay in the enforcement of their right to equal protection of the laws. On the contrary, that right is being subordinated to an interest—the apparent desire of some of the white citizens of Memphis that racial discrimination be maintained in the City's recreational system—which is entitled to no legal or constitutional protection whatever. Thus, this factor, like some of the others, argues far more eloquently for immediate enforcement of the petitioners' constitutional rights than it does for any form of delay.

In summary, neither the list of factors upon which the courts below based their decision nor the evidentiary record on which they purported to draw contains any justification for their refusal to direct the respondents to desegregate the Memphis recreational system forthwith. The record is altogether unconvincing that any really serious physical problems stand in the way of immediate desegregation, let alone that unique obstacles which called for the "with all de-

liberate speed" formulation in the *Brown* case are present here. We submit that the respondents entirely failed to demonstrate that physical necessity or the public interest call for any delay in the vindication of petitioners' unquestionable right to equal protection of the laws.

## CONCLUSION

For the foregoing reasons, the decision of the court below should be reversed.

Respectfully submitted.

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